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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

IN RE: FACEBOOK, INC. CONSUMER
PRIVACY USER PROFILE LITIGATION,

This document relates to:

ALL ACTIONS

CASE NO. 3:18-MD-02843-VC

**FACEBOOK, INC.'S PRELIMINARY
RESPONSE TO THE STATE OF NEW
MEXICO'S MOTION TO INTERVENE,
FILED PURSUANT TO THE COURT'S
MARCH 1 ORDER**

Facebook does not contend that the proposed settlement in this case (the “MDL”), if approved, would release any portion of the claim brought by New Mexico in a separate action being litigated in New Mexico state court. What preclusive effect, if any, a final judgment approving the proposed settlement in this case could have on claims asserted by New Mexico in a separate action being litigated in New Mexico state court is a question that should be addressed, if at all, by that court.

A final judgment approving the proposed settlement in the MDL could, through the operation of the doctrines of issue preclusion or claim preclusion, have some preclusive effect on the State’s claims. *Rex, Inc. v. Manu. Hous. Comm. of State of N.M.*, 892 P.2d 947, 956 (N.M. 1995); *v. IntelliGender, LLC*, 771 F.3d 1169, 1179 (9th Cir. 2014); *New Mexico v. Capital One Bank*, 980 F. Supp. 2d 1346, 1349, 1353 (D.N.M. 2013); *King v. HSBC Bank Nevada*, 2013 WL 12138908, at *1, *3 (D.N.M. 2013).

In response to the State’s demand for confirmation that a judgment in the MDL will have no effect on the State’s claim, Facebook simply reserved its rights. To be clear: Facebook is *not* asking this Court to enjoin the State’s claim or make any determination about the preclusive effect of a judgment in the MDL. Indeed, binding precedent makes clear that preclusion determinations should be made by the court where preclusion is asserted (here, New Mexico state court), not by the court that entered the potentially preclusive judgment (here, this Court). *Smith v. Bayer Corp.*, 564 U.S. 299, 307 (2011) (“Deciding whether and how prior litigation has preclusive effect is usually the bailiwick of the second court.”); *MK Hillside Partners v. CIR*, 826 F.3d 1200, 1207 n.7 (9th Cir. 2016) (“[T]he first court does not get to dictate to other courts the preclusion consequences of its own judgment.”); *Sonner v. Premier Nutrition Corp.*, 49 F.4th 1300, 1307 (9th Cir. 2022) (similar).

In light of the above, the State’s request to intervene should be denied. Whatever interest the State has in determining the future preclusive effect of this Court’s judgment is not a “significantly protectable interest *related to this case*.” (*Contra* Mot. at 6, emphasis added). That interest relates to—and should be adjudicated in—the pending litigation in New Mexico. *Smith*, 564 U.S. at 307; *MK Hillside*, 826 F.3d at 1207 n.7; *Sonner*, 49 F.4th at 1307.

Any restitution interest here belongs to the New Mexico Facebook users; the State’s interest is purely “representative.” *Rex*, 892 P.2d at 955. An intervenor whose rights are “derivative” of current

parties “has no significant protectable interest” that warrants mandatory intervention. *In re Facebook, Inc. Shareholder Derivative Privacy Litig.*, 367 F. Supp. 3d 1108, 1130 (N.D. Cal. 2019).

Facebook reserves the right to further develop these and other arguments in its response.

Dated: March 1, 2023

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